

FRANK ROBBINS

IBLA 98-145

Decided November 4, 1998

Appeal from a decision of the Bighorn Basin Area Manager, Bureau of Land Management, Wyoming, assessing \$1,617 in trespass damages. WYW- 141791.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Trespass:
Generally

Under the right-of-way regulations found at 43 C.F.R. § 2801.3(a), occupancy or development of the public lands in a manner that requires a right-of-way, temporary-use permit, or other authorization without first obtaining the required authorization is an act of trespass, which is defined as "any use, occupancy or development of the public lands or their resources without authorization * * *." 43 C.F.R. § 2800.0-5(u). Thus, the unauthorized blading and other maintenance of a road on public lands is a trespass.

2. Administrative Procedure: Hearings--Hearings--Rules of Practice: Appeals:
Hearings--Rules of Practice: Hearings

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements. Although the Board has discretionary authority to order a hearing before an administrative law judge pursuant to 43 C.F.R. § 4.415, it normally orders a hearing only when an appellant presents a material issue of fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through the ordinary appeal procedure. If no oral testimony is required and an appeal can be resolved relying on documentary submissions, a request for a hearing is properly denied.

APPEARANCES: Karen Budd-Falen, Esq., Cheyenne, Wyoming, for Appellant; Jennifer E. Rigg, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Frank Robbins of the High Island Ranch and Cattle Company has appealed an August 29, 1997, Decision of the Bighorn Basin Area Manager (AM), Bureau of Land Management (BLM), Wyoming, assessing \$1,617 in trespass damages for unauthorized maintenance and use of a road on public lands.

Robbins' High Island Ranch and Cattle Company (Ranch) is located in Hot Springs County, Wyoming. The Ranch's private lands are intermingled with public lands. Access to the Ranch is by one dirt road, the South Fork, Owl Creek Road, which originates approximately 20 miles to the east of Rock Creek where it branches off from a county road in sec. 22, T. 43 N., R. 100 W., Sixth Principal Meridian, Wyoming.

Robbins acquired the Ranch from George Nelson in 1994. By letter of June 28, 1991, BLM's Grass Creek AM authorized Nelson to perform emergency road repair at a specific culvert on the South Fork, Owl Creek Road. Late in 1992, the Grass Creek AM expressed concern that Nelson was performing road maintenance on the South Fork, Owl Creek Road without having obtained a right-of-way (ROW) from BLM. (BLM Answer, Attachments B and C.) On April 5, 1994, BLM issued Nelson ROW WYW-127878 to "construct, operate, maintain and terminate an access road" on specifically described public lands in T. 43 N., R's 100, 101 and 102 W., Sixth Principal Meridian. The grant embraced an area 30 feet wide, 76,930 feet long and comprised an area of 53 acres, more or less. Pursuant to section 3 of the grant, a reciprocal easement in favor of BLM was also entered into. By its terms, the Ranch granted BLM nonexclusive road easement No. RE-W1-214 to maintain, improve, and repair the South Fork, Owl Creek Road. The easement encompassed 15.58 acres. (BLM Answer, Attachment F.) On April 8, 1994, BLM issued a rental determination setting annual rental for the ROW at \$182 for a 1-year term, as adjusted for the remaining months of 1994. (BLM Answer, Attachment G.)

By warranty deed of May 31, 1994, Nelson conveyed the Ranch to Robbins, "subject to all easements, agreements, restrictions, and reservations of record." (BLM Answer, Attachment H.)

By letter of April 20, 1995, the Big Horn Basin ^{1/} AM notified Robbins that an assignment of the ROW to Robbins was necessary if Robbins intended "to maintain the road or use it for other than casual use." In his letter, the AM explained in part as follows:

This easement was originally signed by the previous landowner shortly before you acquired the property and was not recorded

^{1/} On Apr. 2, 1995, as a result of a BLM reorganization in Wyoming, the Grass Creek Resource Area and the Washakie Resources Area were combined to form the Bighorn Basin Resource Area. (BLM Answer n.4.)

with Hot Springs County in time for you to be aware of it upon purchase. In order to ensure an easement that can be properly recorded with the county, we need to have the current owners of record sign the easement.

The AM requested that Robbins sign and return the easement. He stated further that if Robbins did not respond, BLM would assume that he was not interested in the ROW and would "proceed with canceling the right-of-way grant." (BLM Answer, Attachment I.)

Robbins failed to respond. On June 16, 1995, BLM issued an interlocutory Decision holding the ROW for cancellation and affording Robbins 30 days within which to pay the rental to return the ROW to good standing.

When Robbins again took no action, BLM issued a Decision on July 21, 1995, canceling ROW WYW-127827. Robbins did not appeal that Decision.

The file contains an undated memorandum from a BLM wildlife biologist who reported passing "a small dozer-type piece of heavy equipment" presumably on the South Fork, Owl Creek Road, on June 18, 1997. She also saw a "pickup truck with the Hi Island logo hooked up to an empty, long, heavy-duty trailer." On July 7, 1997, an Initial Report of Unauthorized Use was compiled by a BLM rangeland management specialist, who had observed the entire length of the South Fork, Owl Creek Road during a visit to adjacent grazing allotments. (BLM Answer at 8-9.) The report details road blading on various segments of the road tied to legal land descriptions.

On July 9, 1997, BLM issued Robbins a Notice to Cease and Desist. BLM alleged that Robbins had bladed segments of the South Fork, Owl Creek Road on public land without an ROW authorization in violation of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C § 1701 (1994), and 43 C.F.R. § 2801.3, which states:

(a) Any use, occupancy or development of the public lands that requires a right-of-way, temporary use permit, or other authorization pursuant to the regulations of that part and that has not been so authorized, or that is beyond the scope and specific limitations of such an authorization, or that causes unnecessary or undue degradation, is prohibited and shall constitute a trespass as defined in § 2800.0-5.

BLM allowed Robbins 5 days to arrange a settlement of the trespass or show that he was not in trespass.

On July 14, 1997, Robbins sent BLM a letter stating: "Invoice for emergency repairs to South Fork Road in order to access private property--\$2250.00."

On July 23, 1997, BLM's Worland District Manager (DM) and the Assistant AM met with Robbins. According to the DM's memorandum of the meeting, Robbins was advised that he could use existing roads but could do no earth work on public lands. The DM advised Robbins to pay the trespass charges and file an ROW application.

On July 24, 1997, Robbins wrote BLM stating that he was "sorry these trespasses couldn't be worked out" and advising that he had retained counsel.

On July 30, 1997, the DM wrote Robbins stating "[a]s per our conversation, on July 23, 1997, please remit \$1,617.00 to settle" trespass damages resulting from your unauthorized blading of the South Fork, Owl Creek Road. In his letter, the DM explained that damages were determined under 43 C.F.R. § 2801.3 "which directs [BLM] to collect damages in the form of rentals for unauthorized use of the public lands, and our administrative costs of resolving such use." The DM noted that part of the amount could be credited toward ROW rental. The DM also stated that "a[n] itemized breakdown of the costs can be provided if you so desire." He then offered two alternatives: a standard ROW or a reciprocal ROW and outlined the costs associated with each.

By letter of July 29, 1997, to the Bighorn Basin AM, received on July 31, 1997, Robbins responded to BLM's Cease and Desist Order. Robbins alleged that he had requested BLM to repair the road on "numerous" occasions, and that BLM's failure to maintain the road effectively denied him access to his property. Robbins offered to settle the matter through negotiation.

Responding by letter of August 6, 1997, the AM asserted that BLM had never denied Robbins access. The AM noted that Robbins had been advised that his maintenance of the road would require an ROW, that Robbins had been offered an assignment of the existing ROW prior to its termination, and that thereafter offers of ROW's had been extended by BLM. The AM noted that Robbins had not availed himself of any of these opportunities. The AM stated his willingness "to discuss the issues and settle this case."

When Robbins did not respond, BLM, on August 29, 1997, issued the decision now before us on appeal. The decision included a bill for collection in the amount of \$1,617.

In his Statement of Reasons (SOR) Robbins denies that a trespass is established by the record. He asserts that "no BLM employee witnessed the alleged trespass," and that he owns no trucks large enough to transport a "small dozer-type piece of equipment" that have the High Island logo on them." (SOR at 3.) Referring to BLM's Initial Report of Unauthorized Use, Robbins asserts that there is no indication that BLM's rangeland management specialist (who compiled the report) actually witnessed the blading of the road. Robbins contends that BLM has failed to prove that a trespass existed and that BLM officials who compiled the information on the trespass must be examined at an oral hearing. (SOR at 4, 11; Reply at 4.) Robbins requests such a hearing, asserting that "BLM's Answer raises as many factual issues as it answers." (Reply at 6.)

Robbins contends that BLM's failure to maintain the road has resulted in an unconstitutional "taking" of his property. (SOR at 5.) Robbins amplifies this argument by alleging that he repeatedly requested

BLM to maintain the road, but that BLM declined to do so "based solely upon the fact that [Robbins] refused to grant to the BLM a right of way over [Robbins] private property," a refusal which Robbins characterizes as blackmail. (Reply at 2-4.) Robbins further alleges that rather than being offered the choice of either a standard ROW or a reciprocal ROW, BLM actually sought to condition Robbins' access to his own land upon the granting, by Robbins, of a reciprocal ROW. (Reply at 5.) Robbins asserts that he was denied procedural due process in that BLM failed to issue a "proposed decision" under 43 C.F.R. § 4160.1 in order to allow him to file a protest. (SOR at 13.)

Robbins also asserts that the amount assessed in damages is excessive and that the manner of its calculation has not been disclosed to him. He alleges that he "had never seen that information until it was attached to the BLM's Answer" and requests that "it should be stricken from the record." (Reply at 5.)

BLM contends that the record establishes Robbins' trespass and that consequently there is no factual issue requiring a hearing. BLM denies that it ever denied Robbins access to his Ranch and further denies that any "taking" of his private property occurred.

Further, BLM states that 43 C.F.R. § 4160.1 applies to grazing matters and not to the trespass decision issued herein, under 43 C.F.R. Part 2800.

[1] Under the ROW regulations found at 43 C.F.R. § 2801.3(a), occupancy or development of the public lands in a manner that requires an ROW, temporary-use permit, or other authorization without first obtaining the required authorization is an act of trespass. Douglas Noland, 139 IBLA 337 (1997). The regulation at 43 C.F.R. § 2800.0-5(u) defines trespass as "any use, occupancy or development of the public lands or their resources without authorization * * *, or which exceeds such authorization or which causes unnecessary or undue degradation of the land or resources."

A threshold issue, raised by Robbins, is whether there was, in fact, a trespass. In other words, did Robbins use, occupy, or develop public lands without authorization? We conclude that the record thoroughly demonstrates that Robbins committed a trespass. First, it is undisputed that portions of the South Fork, Owl Creek Road cross public land. Earlier in this opinion, we noted that construction activities on the road were documented in a BLM Initial Report of Unauthorized Use. As we noted, that report contains a detailed listing of the blading of segments of the road tied to legal land descriptions of public land. Robbins' attempts on appeal, to argue that no BLM officials actually saw him blading the road is of negligible weight in view of his admission that he did in fact blade the road, an admission which is boldly established by his July 14, 1997, "invoice" to BLM requesting payment for the work. As BLM has pointed out, Robbins also admitted blading the road in testimony in a court proceeding. (BLM Answer,

Attachment U.)^{2/} Therefore, Robbins' allegations of factual discrepancies (SOR at 4; Reply at 3) regarding existence of a trespass are without foundation.

[2] Robbins' arguments concerning deprivation of due process and lack of notice of documents marshalled against him are unsupported. Due process does not require notice and a right to a prior hearing in all cases in which there is an alleged impairment of property rights, so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies that requirement. Hoyl v. Babbitt, 129 F.3d 1377, 1386 (10th Cir. 1997); G. Donald Massey, 142 IBLA 243, 244-45 (1998); Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986).

Due process mandates the opportunity to be heard, and Robbins was afforded that opportunity on a continuing basis throughout the development of this proceeding. It is established and unrefuted that Robbins repeatedly failed to respond to BLM offers concerning the existing ROW, the filing of an application for a new ROW and, thereafter, the settlement of the trespass. Robbins also ignored BLM's offer to review the methodology it utilized to compute damages. That offer was initially made in the DM's July 30, 1997, letter. On appeal, Robbins was furnished that information by counsel for BLM. (BLM Answer, Attachments V through X.)^{3/} Robbins will not now be heard to complain that he "had never seen that information until it was attached to the BLM's Answer" and to argue that "it should be stricken from the record." (Reply at 5.)

Nor was BLM required to issue Robbins a proposed decision under 43 C.F.R. § 4160.1. That regulation, subsumed under 43 C.F.R. Group 4100, provides for administrative remedies in grazing matters and is not pertinent to either ROW's or trespass. As the DM explained to Robbins in his July 30, 1997, letter, the applicable regulation is 43 C.F.R. § 2801.3, which provides for notification "in writing" to anyone determined by the authorized officer to have used or occupied the public lands without proper authorization. 43 C.F.R. § 2801.3(a) and (b). The regulation at 43 C.F.R. § 2801.3(f) provides that anyone "adversely affected by a decision of the authorized officer under this section may appeal that decision under the provisions of part 4 this title." There is no provision in 43 C.F.R. Group 2800, governing ROW's, for the issuance of a proposed decision with right of protest.

^{2/} Attachment U is an excerpt from a transcript in Case No. 97-CR-092-B (Dec. 3, 1997) in the U.S. District Court for the District of Wyoming.

^{3/} BLM's computation of the damages was arrived at utilizing the area involved, 7.64 acres, a per acre rental of \$6.81, labor and administrative costs and an 18 percent indirect cost adjustment. See BLM Answer, Attachment V. This computation tracks 43 C.F.R. § 2801.3 and Robbins has not challenged it except to request an oral hearing. The determination of fair market value is within the discretion of the Secretary under FLPMA, 43 U.S.C. § 1713(d) (1994), and that discretion appears to have been soundly exercised.

An inquiry to be made in determining whether a hearing is warranted is whether an administrative law judge would be better able to make a reasoned decision on the basis of an oral hearing than the Board can make on the existing record. Robbins has made no offer of further evidence. A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the appeal. See Natec Minerals, Inc., 143 IBLA 362, 373-74 (1998) and cases there cited. This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977). There are, in this case, no significant factual or legal issues requiring a hearing, and Robbins' request for one is denied.

Robbins has also made allegations questioning BLM's motives and its good faith in this matter. Robbins fails to document any instance of alleged BLM "blackmail," concerning the grant of a reciprocal ROW, ^{4/} or BLM recalcitrance in its dealings with him regarding the ROW or the trespass. The record effectively shows the contrary; intransigence was the tactic of Robbins, not BLM. Significantly, Robbins offers no evidence of road conditions prior to his blading or that BLM blocked his access to his Ranch. Therefore, his allegation that BLM engaged in an unconstitutional "taking" of his property is unsupported.

To the extent not discussed herein, Robbins' other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge

^{4/} Under 43 C.F.R. § 2801.1-2 BLM is authorized to require that a road ROW applicant grant an equivalent, reciprocal ROW to the United States as a condition to receiving an ROW pursuant to section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1994). See Charles Ryden, 119 IBLA 277 (1991).

